QUESTION PRESENTED

Section 2244(d)(2) of Title 28, United State Code, provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

In interpreting the statute, this Court previously held in *Carey v. Saffold*, 536 U.S. 214 (2002), that an application is "pending" between two levels of California state court review as long as the prisoner's latter filing was timely under California state law. The Question Presented by this case—which was neither decided nor even addressed in *Carey v. Saffold*—is:

When a warden argues that interval tolling pursuant to 28 U.S.C. § 2244(d)(2) is not available because a prisoner's filing was untimely (according to the warden) under California state law *but* the California state court has given no indication that the filing was untimely, should the federal court presume that the prisoner's application was "pending" (as the Ninth Circuit did and the Respondent urges) or should the federal court engage in an independent determination of whether the filing was timely under California state law (as Petitioner urges)?

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BRIEF FOR THE RESPONDENT

Respondent Reginald Chavis respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") be affirmed.

RELEVANT STATUTORY PROVISION

Section 2244(d) of Title 28, United States Code, provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.
>
> * * *
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

This brief first outlines the relevant procedural rules for filing a petition for writ of habeas corpus in California federal court after the passage of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"). It then recounts the relevant procedural history of this case.

I. Federal Habeas Corpus Rules in California.

A. AEDPA Limitations and Tolling Provisions.

On April 24, 1996, AEDPA became effective. The statute imposed a new one-year limitations period on all petitions for writ of habeas corpus filed under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(d)(1). Where a prisoner's conviction became final prior to the effective date of AEDPA, however, "the federal limitations period [begins] running on AEDPA's effective date . . . giving [the prisoner] one year from that date . . . to file a federal habeas petition." *Carey v. Saffold*, 536 U.S. 214, 216-17 (2002).

AEDPA also provides for tolling of the limitations period for "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). The tolling permitted by § 2244(d)(2) was included in AEDPA to "promote[] the exhaustion of state remedies" as required by 28 U.S.C. § 2254(c). *Duncan v. Walker*, 533 U.S. 167, 178 (2001).

B. California's Unique Collateral Review System.

Although § 2244(d)(2) of AEDPA clearly contemplates the tolling of certain periods of state collateral review, the federal courts have struggled to determine precisely which periods of time are properly tolled under the statute. This difficulty has been particularly acute in California due to the unique nature of the state's collateral review system. California's collateral review system is different from almost every other state in two respects.

First (and unlike every other state), California does not utilize a standard "up the ladder" appellate procedure in petitions for habeas relief. In California, the superior courts, the Courts

of Appeal, and the California Supreme Court all have original jurisdiction to hear petitions for habeas relief, *see* Cal. Const. Art. VI § 10, and the preferred—*but not required*—procedure is for prisoners to first file in superior court, then in the Court of Appeal, and then in the Supreme Court. *See In re Ramirez*, 108 Cal. Rptr. 2d 229, 232 (Cal. Ct. App. 2001). If a superior court denies the petition, the prisoner's only recourse is to file a new original petition in a higher state court—preferably the Court of Appeal. *See In re Clark*, 855 P.2d 729, 740 n.7 (Cal. 1993). If the Court of Appeal denies the petition, the prisoner may file a new original petition in the California Supreme Court.[1] *See In re Reed*, 663 P.2d 216, 217 n.2 (Cal. 2004), *overruled on other grounds by In re Alva*, 92 P.3d 311 (Cal. 2004).

Second (and unlike 48 of the 49 other states), there is no fixed deadline in California to file a petition for writ of habeas corpus before a state appellate court. Instead, "a petitioner seeking relief on habeas corpus need only file a petition without substantial delay, or if delayed, adequately explain the delay." *In re Harris*, 855 P.2d 391, 397 (Cal. 1993).

C. *Carey v. Saffold* and "Interval Tolling".

In 2002, this Court granted certiorari in *Carey v. Saffold*, a case that involved the application of AEDPA's tolling provision to California's unique system of collateral review. In deciding the case, the Court first addressed a question that applies to every state: "Does the word ['pending' in § 2244(d)(2)] cover

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1. Both the prisoner and the State have the right to seek review of the decision of the Court of Appeal in the California Supreme Court. *See* Cal. Penal Code § 1506. The deadline to file a petition for review is within ten days of the date on which the order issued by the Court of Appeal became final. *See* Cal. R. Ct. 28(e).

the time between a lower state court's decision and the filing of a notice of appeal to a higher state court?" *Saffold*, 536 U.S. at 217. This is often referred to as "interval tolling." Agreeing with every Court of Appeals that had addressed the issue, the Court interpreted the word "pending" in § 2244(d)(2) to authorize interval tolling. *Id.* at 220 – 221.[2]

Second, the Court addressed whether the word "pending" applied "similarly to California's unique state collateral review system—a system that does not involve a notice of appeal, but rather the filing (within a reasonable time) of a further original state habeas petition in a higher court". *Id.* at 217. Ultimately, the Court decided that "California's system functions in ways sufficiently like other state systems of collateral review to bring intervals between a lower court decision and a filing of a new petition in a higher court within the scope of the statutory word 'pending.'" *Id.* at 223. As a result, the *Saffold* Court held that § 2244(d)(2) authorized interval tolling even in California. *See id.* at 217, 221 – 225.

The *Saffold* Court finally addressed a considerably more narrow (and particularized) question: "was the petition at issue . . . (filed in the California Supreme Court 4½ months after the lower state court reached its decision) pending during that period, or was it no longer pending because it failed to comply with state timeliness rules?" *Id.* at 217. In answering this question, the Court implicitly held that tolling was not available

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2. In reaching this conclusion, the Court stated that, "an application is pending as long as the ordinary state collateral review process is 'in continuance'—*i.e.*, 'until the completion of' that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition, it remains 'pending.'" *Saffold*, 536 U.S. at 219 – 220.

under § 2244(d)(2) between two levels of California state court review if a prisoner's filing with the higher court was untimely, stating:

> It remains to ask whether Saffold delayed "unreasonably" in seeking California Supreme Court review. *If so, his application would no longer have been "pending" during this period.*

Id. at 225 (emphasis added).

In light of the Court's premise that statutory tolling was not available between two levels of California state court review if a prisoner's filing with the higher state court was untimely, the Court was forced to address whether Mr. Saffold had "delayed 'unreasonably' in seeking California Supreme Court review." *Id.* at 225. The California Supreme Court had given some indication—albeit an ambiguous one—that it believed that Mr. Saffold had, in fact, delayed unreasonably. "The California Supreme Court denied the petition 'on the merits and for lack of diligence,' *which raised the question whether that court had dismissed for lack of merit, for untimeliness, or for both.*" *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1812 (2005).

Because of this ambiguity in the state court's ruling,[3] the Court criticized the Ninth Circuit for assuming that the California Supreme Court's decision to use the words "on the merits" necessarily meant that the California Supreme Court could not have found Mr. Saffold's petition to be untimely. This Court explained, "[g]iven the variety of reasons why the

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3. The California Supreme Court's denial was ambiguous because the phrase "lack of diligence" in its order could have referred to Mr. Saffold's delay during two different time periods, only one of which was relevant for purposes of AEDPA. *See Saffold*, 536 U.S. at 226.

California Supreme Court may have included the words, 'on the merits,' those words cannot by themselves indicate that the petition was timely." *Saffold*, 536 U.S. at 226. As such, this Court remanded the case to the Ninth Circuit to evaluate what the California Supreme Court meant by the phrase "lack of diligence." *Id.* at 226.

This Court gave no specific instruction to the Court of Appeals regarding what to do if it could not determine what the California Supreme Court meant by "lack of diligence." Instead, the Court merely stated:

> We leave it to the Court of Appeals to evaluate these and any other relevant considerations in the first instance. We also leave to the Court of Appeals the decision whether it would be appropriate to certify a question to the California Supreme Court for the purposes of seeking clarification in this area of state law.

Id. at 226 – 27.

In so doing, *Saffold* necessarily left open the very question presented by this case: What is a federal court to do when a warden argues that interval tolling pursuant to 28 U.S.C. § 2244(d)(2) is not available because a prisoner's filing was untimely (according to the warden) under California state law *but* the California state court—unlike in *Saffold*—has given *no indication* that the prisoner's filing was untimely? May the federal court presume that the application was "pending," or must it instead engage in an independent determination of whether the filing was timely under California state law? This is the dispositive question squarely presented by this case.

II. The Procedural History of This Case.

A. Conviction and Direct Appeals.

Following a jury trial in Sacramento County, California, Respondent Reginald Chavis was convicted of attempted murder and mayhem on July 29, 1991. J.A 2. On July 30, 1992, the California Court of Appeal affirmed his conviction. J.A. 2. On September 4, 1992, Mr. Chavis filed a petition for review with the California Supreme Court. J.A. 2. On October 28, 1992, the California Supreme Court denied Mr. Chavis' petition for review. J.A. 2.

B. Lower State Court Collateral Review.

Mr. Chavis, acting *pro se*, began to exhaust his state remedies on May 14, 1993 when he filed a petition for writ of habeas corpus in the Sacramento County Superior Court. J.A. 2. On July 30, 1993, the Superior Court denied this petition. J.A. 7-17. Following the accepted procedure in California, Mr. Chavis—again acting *pro se*—next filed a further original petition for a writ of habeas corpus in the California Court of Appeal on August 22, 1994. J.A. 3. On September 29, 1994, the Court of Appeal denied this petition. J.A. 3.

C. California Supreme Court Collateral Review.

1. Delayed filing.

As Mr. Chavis explained in his *pro se* papers before the district court in this case:

> Some time after the denial of [the May 14, 1993 California Superior Court] petition, petitioner was assigned prison duties. Petitioner was required to

> perform these duties 5 days weekly, on 7 and a half hour shifts per day – on the exact days and [times when] the law library . . . was available to inmates. Petitioner was unable to have access to necessary materials and information needed, as custody refused to allow petitioner access to the law library. However, petitioner made efforts continually, to go forward with his collateral efforts without the access. Remaining confused and unable to understand the many technical matters confronting him, petitioner [filed his habeas petition with the California Court of Appeal] on August 22, 1994 [which] was denied on September 29, 1994. Being aware that he had been insufficiently and inadequately prepared [in his filing with the California Court of Appeal] . . . petitioner decided against . . . again attempting to go forward with filing another application with "guess work." Petitioner would try to persuade custody to allow him the access that he needed, first.

J.A. 37-38.

For some time, Mr. Chavis attempted informally and unsuccessfully to convince the prison authorities to permit him access to the library. J.A. 28, 38. Mr. Chavis:

- asked his supervisor to be granted time off in accord with the relevant statute in order to use the library; J.A. 28;

- wrote to "the law librarian and ask[ed] for PLU [privileged library use] status as a result of [his] situation, to which [he] never received a response"; J.A. 28, and

- "submitted a Job Change application which was approved . . . but never occurred. . . ." J.A. 28.

Eventually, Mr. Chavis was told by another inmate that the prison's refusal to permit him access to the library was an illegal deprivation of his access to the courts and that he could file a formal grievance.[4] J.A. 38. Mr. Chavis filed such a grievance on December 12, 2005. J.A. 26. In this grievance, Mr. Chavis clearly stated the problem:

> This inmate is assigned to the above stated position . . . with stipulated RDO's [regular days off] being Sun/Mon. I am currently without a hired attorney but, I work pro-per on my criminal case and I am in the process of attempting to pursue a filing of a habeas corpus petition on my criminal conviction. In order to complete my petition it is necessary for me to get into C-facility's law library to research and obtain the required law, points and authorities to validate my filing. My problem is that the law library is closed on Sun/Mon, which, incidently [*sic*] are also my assigned RDO's. The library closes at about 1:45 p.m. during it's [*sic*] open days of the week, and this inmate is not permitted to be relieved from duty until 1:30 p.m. I have no reasonable access to the law library. I have discussed this problem with c/o [correctional officer] Fender who supervises me, and he advises me that he can not relieve me from

4. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 346 (1996) ("'[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.'") (quoting *Bounds v. Smith*, 430 U.S. 817, 828 (1977)).

> duty to go to the library regardless of the circumstances.

J.A. 25, 28. This grievance was summarily denied the very day after it was filed. J.A. 31.

Mr. Chavis immediately filed a formal appeal of the denial of this grievance. J.A. 25-28. In this appeal, Mr. Chavis stated:

> My superior says that he can't grant me ETO [excused time off]. However, in accord to [*sic*] 3045.2 (2)(G)(5) the lieutenant or high authority can do so. Please . . . unassign me or change me to a PM assignment A.S.A.P. Thank-you.

J.A. 26.

About one month later, Mr. Chavis received a "first-level" response to his appeal. J.A. 29-30. This response stated:

> You are requesting use of ETO [excused time off] time [] to go to the library. . . . On January 12, 1996, you were interviewed and an investigation was conducted by this writer regarding the above-noted appeal. During my investigation I found that use of ETO time is not an option for you in this circumstance. California Code of Regulations, title 15, Section #3045.2 specifies authorized use of ETO time. Access to the Legal Library is not listed, nor is it considered a "non-routine recreation and entertainment" activity, as you suggest. You [*sic*] best option at this point is to request a work assignment change that would allow access to the Legal Library as a GLU [general library use]. . . . For the reasons cited above your appeal is DENIED.

J.A. 29-30. Mr. Chavis immediately filed a formal appeal of this denial *again* requesting either excused time off or a job reassignment. J.A. 28.

Another month later, Mr. Chavis received a "second-level" written response to his appeal. J.A. 23-24. In this response, Mr. Chavis' request for excused time off to go to the law library was again denied. J.A. 24. Mr. Chavis' request to have his job changed to one that would permit him some access to the law library was referred to the prison's Unit Classification Committee. J.A. 24. The next month, the Unit Classification Committee recommended Mr. Chavis for an evening position, J.A. 73-74, and at some point thereafter he received a new job.

Mr. Chavis' reassignment was essentially meaningless, however, because there were a series of lockdowns at his prison and he was not permitted to use the law library as a result. Although Mr. Chavis does not have access to the records of his former prison, he recalls that his area was locked down continuously for five months in 1996 and regularly throughout 1997. J.A. 39.

2. "Postcard" denial.

As a result of the grievance process and lockdowns described above, Mr. Chavis was unable to file a habeas petition with the California Supreme Court until November 10, 1997. J.A. 3. In this November 10, 1997 filing, Mr. Chavis answered Question 15 of the Judicial Council Form required by the State of California as follows:

> [Question:] Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. [Answer:] Your petitioner is

> a layman of law and was illegally and actively being denied access to the court by the prison [where] petitioner is confined. Your petitioner was granted an intrainstitutional appeal to attain access to the court. (See Exhibit 1).

J.A. 19-21. Mr. Chavis attached several pages of evidentiary support as Exhibit 1 to his habeas filing in support of his answer to Question 15. J.A. 22-31.

On April 29, 1998, the California Supreme Court denied Mr. Chavis' petition. The order denying the petition read in its entirety: "The petition for writ of habeas corpus is DENIED." J.A. 32. A denial without any comment or case citation such as this is commonly referred to as a "postcard" denial.

D. Federal Court.[5]

On August 30, 2000, Mr. Chavis filed a petition for writ of habeas corpus in federal district court. J.A. 5. On February 13, 2001, the warden filed a motion to dismiss Mr. Chavis' petition on the ground that it was time-barred under the one-year statute of limitations in § 2244(d)(1) of AEDPA. J.A. 5. On September 20, 2001, the district court granted the motion and dismissed the case. J.A. 5. On October 1, 2001, Mr. Chavis filed a notice of appeal. J.A. 5. On August 27, 2004, the Ninth Circuit filed

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5. After he became aware of new facts and law (and prior to filing in federal court), Mr. Chavis filed a second round of state habeas petitions. J.A. 3-4, 40-41. This second round of state habeas filings is not relevant to the issue currently before this Court, as Petitioner's arguments (and the grant of certiorari) relate exclusively to the three-year delay between the denial of the habeas petition by the California Court of Appeal in September 1994 and the November 1997 filing of the habeas petition in the California Supreme Court.

an opinion and entry of judgment that reversed the district court and remanded the case for further proceedings. J.A. 6.

On November 22, 2004, the warden filed a petition for writ of certiorari with this Court. In this petition, the warden asked this Court to grant certiorari on the following question:

> Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not "unreasonably" delay in filing the petition – and therefore was entitled to tolling during that entire period – because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial "on the merits"?

SUMMARY OF ARGUMENT

This case presents an important question that has never been resolved by this Court:

> What is a federal court to do when a warden argues that interval tolling pursuant to 28 U.S.C. § 2244(d)(2) is not available because a prisoner's filing was untimely (according to the warden) under California state law *but* the California state court has given no indication that the prisoner's filing was, in fact, untimely?

Petitioner's position is that, under such circumstances, a federal court must conduct its own independent analysis of state law in order to determine whether or not the prisoner's prior state filing was timely. Respondent's position—which was adopted by the

Ninth Circuit—is that the federal court should presume that a prior state filing was "pending" under § 2244(d)(2) unless the state court gives *some indication* that the prior state petition was not timely filed under state law.

The primary argument advanced by Petitioner in support of his position is the assertion that Respondent's presumption was already rejected by this Court in *Carey v. Saffold*. Petitioner is mistaken. Unlike this case, *Saffold* did not involve a California state court order that was silent on the issue of whether the prisoner's filing was untimely. To the contrary, this Court's decision in *Saffold* was predicated on the very notion that an ambiguous phrase in the California Supreme Court's order *could have indicated* that the state court found the prisoner's filing to be untimely under state law. In *Saffold*, this Court remanded the case because the Court of Appeals had failed to consider whether or not the California Supreme Court had, in fact, ruled that the relevant prior state petition was untimely filed. *Saffold* gave no instruction to the Court of Appeals regarding what to do if it could not determine what the California Supreme Court meant by its ambiguous language. In so doing, this Court necessarily left open the very question presented by this case.

As Petitioner concedes, the text of § 2244(d)(2) does not indicate whether Respondent's presumption—or the independent determination rule urged by Petitioner—is the approach intended by Congress. For this reason, this Court must select the rule that is more consistent with the purpose of AEDPA as well as the purpose of the Great Writ. The presumption urged by Respondent is more consistent with both.

Congress enacted AEDPA to further the principles of federalism, comity, and finality. AEDPA's statute of limitations

serves the states' interest in finality. AEDPA's exhaustion requirement serves to promote comity. Section 2244(d)(2)—AEDPA's tolling provision—balances the interests served by the exhaustion requirement and the limitation period. It promotes exhaustion by protecting a prisoner's ability to pursue state remedies without losing the opportunity to later file in federal court. At the same time, it serves the states' interest in finality by only tolling the federal limitations period for a prisoner's proper use of state collateral procedures. Respondent's presumption is far more faithful than Petitioner's rule to the careful balance struck by Congress in § 2244(d)(2).

Respondent's presumption promotes federalism by preventing federal courts from "second-guessing" state courts' determinations of state law. Under Petitioner's rule, federal courts will announce—and necessarily affect—California law regarding timeliness where the state courts, for a number of good reasons (all acknowledged as valid by Petitioner), felt it inappropriate to do so. Petitioner claims that Respondent's presumption will compromise federalism by "forcing" state courts to note in every habeas case whether a prisoner's state petition was timely. This contention, however, has already been properly rejected by this Court in the procedural bar context. Put simply, it is far less intrusive to require state courts to give some indication that a state petition is untimely than it is for federal courts to conduct an independent determination of state law.

Respondent's presumption promotes comity by encouraging prisoners to exhaust state remedies in the manner provided by the state. In contrast, Petitioner's rule will encourage *both* protective federal filings *and* premature state filings. And, in light of this Court's recent decision in *Pace*, Petitioner's rule will have such an effect not only in California, but in each of the fifty states.

Respondent's presumption does not compromise finality, certainly not to the extent suggested by Petitioner. Notably, Respondent's presumption and Petitioner's independent determination rule achieve identical results in cases where a prisoner's petition fails to state a prima facie case for relief. And in cases where a potential constitutional violation has been alleged, it is Petitioner's rule that is more likely to increase delay as well as to place a large burden on the federal courts. This is true because California's timeliness rules are extraordinarily difficult to apply, postcard denials present the most difficult questions of timeliness, and Petitioner's rule will create double work in cases in which the federal courts ultimately find that the state court petition at issue was, in fact, timely under state law.

Finally, Petitioner's rule risks compromising the intended function of the Great Writ, which is to protect individual rights embodied in the United States Constitution. Under Petitioner's rule, it is inevitable that there will be cases in which a federal court will misconstrue the law of California (or another state) in the wake of a state court's silence on the issue of timeliness. In such cases, the prisoners involved will have fully complied with AEDPA and, nonetheless, will have been stripped of any opportunity for federal habeas review. Not only is this possible under Petitioner's rule, but it is likely to occur in those very cases in which a constitutional violation has taken place.

For these reasons, this Court should adopt Respondent's presumption that a petition is "pending" under § 2244(d)(2) unless a state court gives *some indication* that the prisoner's prior state court filing was untimely. Because the Ninth Circuit properly applied such a presumption to the facts of Mr. Chavis' case, the decision below should be affirmed.

ARGUMENT

I. The Question Presented By This Case Has Not Previously Been Resolved By This Court and Is Not Answered By the Text of AEDPA.

Although it contains a scant 37 words, the importance of 28 U.S.C. § 2244(d)(2) cannot be underestimated. This Court has previously granted certiorari on four separate occasions to resolve disputes over the proper interpretation of language in this tolling provision. *Artuz v. Bennett*, 531 U.S. 4 (2000) (interpreting the words "properly filed"); *Duncan v. Walker*, 533 U.S. 167 (2001) (interpreting the words "application for State post-conviction or other collateral review"); *Carey v. Saffold*, 536 U.S. 214 (2002) (interpreting the word "pending"); *Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2005) (again interpreting the words "properly filed").

As noted above, this case presents an important question regarding the proper application of the statute that has never been resolved by this Court. The question is:

> When a warden argues that a prisoner is not entitled to tolling of AEDPA's statute of limitations under 28 U.S.C. § 2244(d)(2) because one of the prisoner's prior state filings was untimely (according to the warden) under state law *but* the state court gave no indication that the filing was untimely, should the federal court presume that the application was "pending" (as the Ninth Circuit did and the Respondent urges) or should the federal court engage in an independent determination of whether the filing was timely under state law (as Petitioner urges)?

There are only four options available to the federal court in such a situation: (i) the federal court could ask the state court to clarify whether the filing was untimely under state law; (ii) the federal court could presume that the state application *was not "pending"* unless the state court made an explicit finding that it was timely filed under state law; (iii) the federal court could presume that the state application *was "pending"* unless the state court gave some indication that the petition was untimely filed under state law; or (iv) the federal court could engage in its own independent factual analysis and application of state law to determine whether the filing was timely. The first two of these options can be easily rejected, and are supported by neither Petitioner nor Respondent in this case.[6] The third option—

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6. The first option—certification—may be desirable when, as in *Saffold*, the state court has made an ambiguous statement that might constitute a finding of untimeliness under state law. Certification would be inappropriate, however, in the face of state court silence regarding the issue because it would (1) result in a deluge of certification requests, (2) be unavailable in states that either do not allow certification or do not allow certification from district courts, and (3) have limited—if any—value in the event the state court did not respond or there was unacceptable delay in the response. *Cf. Arizona v. Evans*, 514 U.S. 1, 7 (1995) (noting "the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court"); *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983) (noting that certification is "unsatisfactory both because of the delay and decrease in efficiency of judicial administration and, more important, because [it] place[s] significant burdens on state courts to demonstrate the presence or absence of our jurisdiction"). The second alternative similarly lacks merit as there is no reason to believe that Congress intended to predicate statutory tolling on a state court's explicit finding of timeliness. Thus, as both Petitioner and Respondent concede, the relevant choice is between a presumption that the application was "pending" or independent federal adjudication of timeliness pursuant to state law.

adopted by the Ninth Circuit—is the position urged by Respondent in this case. The fourth option is the position urged by Petitioner.

The Court's decision in this matter should be animated by a desire to advance the objectives of AEDPA (*i.e.*, comity, finality, and federalism), preserve the limited resources of the federal judiciary, and guard the role of the federal courts in ensuring that innocent individuals are not being incarcerated and that the federal constitutional rights of these individuals are preserved.

Rather than directly confront the difficult question of which rule better promotes these aims, however, Petitioner instead takes the untenable position that the issue has already been settled by this Court. Pet. Br. 19 ("The decision below is, on its face, in direct conflict with this Court's decision in *Saffold*."). As explained below, Petitioner is mistaken. The question presented by this case was neither decided nor even addressed by this Court in *Saffold*. Moreover, as Petitioner concedes, the question presented cannot be resolved by merely interpreting the text of § 2244(d)(2). Put simply, the question squarely presented by this case is an open one and it must be answered by determining which rule better advances the purposes of AEDPA and of the Great Writ.

A. The Question Presented Was Neither Decided Nor Even Addressed in *Carey v. Saffold*.

AEDPA's tolling provision provides that:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is

> pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). In *Saffold*, this Court held that an application for state collateral review is "pending" in California during the time between the denial of a state habeas petition and the filing of a further original state habeas petition in a higher court *as long as* the latter petition was timely filed under California state law. *See Saffold*, 536 U.S. at 221, 225 – 226.[7]

Petitioner asserts that this Court in *Saffold* issued a "clear instruction to the federal courts to look to and apply state timeliness standards." Pet. Br. 16. But the Court in *Saffold* said no such thing; it stated only that the Ninth Circuit should determine whether *the California Supreme Court* found Mr. Saffold's petition to be untimely.[8] As this Court has subsequently noted:

> In *Saffold*, we considered whether § 2244(d)(2) required tolling during the 4½ months between the California appellate court's denial of Saffold's postconviction petition and his further petition in the California Supreme Court. The California Supreme Court denied the petition "on the merits and for lack of diligence," which raised the question

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7. Similarly, this Court recently announced that—for purposes of § 2244(d)(2)—a petition is not "properly filed" if it is untimely under state law. *Pace*, 125 S. Ct. at 1812.

8. Indeed, the very language employed by the Petitioner in making his argument implicitly concedes that *Saffold* contained no such explicit directive. In Petitioner's words, "this Court [in *Saffold*] *contemplated* that the federal courts would determine for themselves whether a state application was timely in the absence of a clear ruling from the state court." Pet. Br. 16 (emphasis added).

> whether *that court* had dismissed for lack of merit, for untimeliness, or for both.

Pace, 125 S. Ct. at 1812 (emphasis added).

This Court gave no instruction to the Court of Appeals regarding what to do if it could not determine what the California Supreme Court meant by its ambiguous reference to Mr. Saffold's "lack of diligence." Instead, this Court merely stated:

> We leave it to the Court of Appeals to evaluate these and any other relevant considerations in the first instance. We also leave to the Court of Appeals the decision whether it would be appropriate to certify a question to the California Supreme Court for the purposes of seeking clarification in this area of state law.

Saffold, 536 U.S. at 226 – 227.[9]

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9. On remand, the Ninth Circuit found that the California Supreme Court's denial "on the merits and for lack of diligence" referred to Mr. Saffold's lack of diligence in initially filing his habeas petition in state court (a time period that was irrelevant to the AEDPA statute of limitations), not to Mr. Saffold's delay in filing his petition before the state supreme court (an interval that would have rendered his federal petition untimely unless he was entitled to interval tolling). *Saffold v. Carey*, 312 F.3d 1031, 1035-36 (9th Cir. 2002). Because the Ninth Circuit concluded that the state court had not held that Mr. Saffold's delay during the relevant time period was inappropriate, it concluded that Mr. Saffold was entitled to interval tolling and that his federal petition was not barred by AEDPA's statute of limitation. *Id.* at 1036. This series of events demonstrates that the Ninth Circuit understood this Court's remand order in *Saffold* as an instruction to determine whether the *state court* denied the petition as untimely and did not interpret this Court's

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In refusing to articulate a rule regarding what federal courts must do if they cannot ascertain the meaning of an ambiguous state court reference to untimeliness, the *Saffold* Court necessarily left open the very question presented by this case: What is a federal court to do when the state court is *silent* on the issue of whether the prisoner's filing was timely under state law?

Thus, *Saffold* does not endorse (either explicitly or implicitly) Petitioner's proposed rule, *i.e.*, that a federal court must conduct an independent determination of timeliness under state law when the state court has given no indication that a prior state petition was untimely. Indeed, this Court's recent opinion in *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005), suggests that this Court has already implicitly *rejected* precisely such a rule:

> Although respondent contends that petitioner's motion for state postconviction relief was untimely, and that the District Court's denial of statutory tolling was therefore correct under *Pace v. DiGuglielmo*, 544 U.S. __, 125 S. Ct. 1807, 161 L.Ed. 669 (2005), *the Florida courts made no reference to untimeliness in dismissing petitioner's motion.*

Gonzalez, 125 S. Ct. at 2560 n.8 (emphasis added). Although *Gonzalez* involved the issue of whether a prior state habeas

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decision in *Saffold* to mean that it should conduct an independent determination of the reasonableness of the petitioner's delay under state law. *See also Chavis v. LeMarque*, 382 F.3d 921, 926 (9th Cir. 2004) (stating that on remand in *Saffold* the Ninth Circuit rejected the contention that it must determine the reasonableness of delay under state law "and held that the relevant inquiry is whether the state court denied the petition as untimely").

petition was "properly filed" under § 2244(d)(2), this is a distinction without a difference. If, in the wake of state court silence, an independent federal inquiry regarding timeliness is inappropriate for purposes of determining if a petition was "properly filed" under § 2244(d)(2), it can be no more appropriate for purposes of determining if a petition was "pending" under the same statute.

The proper outcome of the present case is accordingly not answered by *Saffold*; indeed, if anything, this Court's precedent—particularly *Gonzalez*—provides more support for Respondent's position than it does for Petitioner's.

B. The Question Presented Is Not Answered By the Text of § 2244(d)(2).

Conspicuously absent from Petitioner's opening brief is any suggestion that the text of § 2244(d)(2) requires a federal court, when confronted with a "postcard" denial of a state habeas petition, to conduct an independent determination of timeliness. This is true for good reason.

If the statute *required* the federal court to conduct an independent determination of timeliness in the case of a "postcard" denial, then it would also *require* the federal court to conduct an independent determination in those cases where the state court had *explicitly* ruled that the petition was either timely or untimely. This is so because nothing prevents a state court from erroneously determining the facts (*e.g.*, that a document was filed on a particular date or that a particular excuse for a delayed filing was credible) or erroneously applying its law in any given case.[10] Therefore, if "pending" meant that a

10. As this Court has noted, findings of state law by lower state court tribunals are not dispositive interpretations of state law and may be erroneous even under state law. *See Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

federal court was compelled to assure itself, without the use of any presumptions, that a petition was timely under state law, it would require an independent inquiry in all cases.

This Court has already twice rejected such a reading of the statute. *See Saffold*, 536 U.S. at 226 ("If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable,' *that would be the end of the matter*. . . .") (emphasis added); *Pace*, 125 S. Ct. at 1812, 1814 ("*Because the state court rejected petitioner's PCRA petition as untimely*, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2244(d)(2).") (emphasis added). In other words, both *Saffold* and *Pace* instruct the federal courts to *presume* that the state court correctly applied its own law, and such presumptions—even conclusive ones (as in *Saffold* and *Pace*)—are entirely consistent with both the statutory text and purpose of AEDPA.

Of course, this does not establish that every presumption is appropriate. What it does show is that by conditioning the federal right to toll AEDPA's limitations period on whether an application was pending under state law, Congress enacted a statute that permits—indeed, that invites—federal courts to make *appropriate* presumptions regarding whether a prisoner's state application was pending. Such presumptions are appropriate where they advance the purposes of AEDPA and of the Great Writ, as does the presumption employed by the Ninth Circuit in this case.

Moreover, although the three-year delay in this particular case is somewhat lengthy, § 2244(d)(2) unambiguously does not prohibit tolling merely because the state collateral proceedings took a long time. As long as state proceedings are "pending," § 2244(d)(2) provides for tolling. It is for this same

reason that § 2244(d)(2) grants tolling even to second, third, or subsequent state habeas petitions, as long as they are proper under state law. *See Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998).

Similarly, AEDPA does not attempt to prevent states from fashioning their own state habeas regimes and timelines, even when such procedures may necessarily (or in a particular case) result in *extensive* delays before the filing of a federal habeas petition. To take an extreme example, § 2244(d)(2) would grant tolling for even 25-year delays if California (or any other state) elected to establish a 25-year time limit in which a prisoner could file a direct appeal to the California Supreme Court from the denial of his habeas petition by the California Court of Appeal. Moreover, as applicable here, AEDPA indisputably grants tolling even in cases that involve years-long delay so long as state law— whether pursuant to a "reasonableness" doctrine or any other statutory or common law principle— authorizes such delay.

Put simply, the goal of AEDPA's statute of limitations is to ensure that federal petitions are filed expeditiously *once state proceedings have finally been concluded*. The fact that California, or any other state, may allow a three-year (or longer) delay, pursuant to state law, in between the conclusion of intermediate appellate proceedings and the filing of a habeas petition in the state supreme court is entirely consistent with both the purpose and text of AEDPA.

The central question, then, is not whether there has been a three-year delay, because California state law indisputably allows such a delay in particular cases, and AEDPA clearly provides tolling if such a delay is permitted under state law. Rather, the dispositive question here is whether the timeliness

of such a state law petition should be determined by California state courts or by independent federal adjudication of this state law issue. When the California state court has given no indication that the filing was untimely, should the federal court presume that the prisoner's application was "pending," or should the federal court instead make its own determination pursuant to its own understanding of California state law?

II. Respondent's Presumption Is Most Consistent with the Purposes of AEDPA and the Great Writ.

Within the limits of statutory language and controlling precedent, AEDPA—like any statute—should be applied in a way that furthers its purpose. *See Rose v. Lundy*, 544 U.S. 509, 516-17 (1982) ("Because the legislative history of § 2254 [of AEDPA], as well as the pre-1948 cases, contains no reference to the problem of mixed petitions, in all likelihood Congress never thought of the problem. Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope.").

A. Respondent's Presumption Furthers the Purpose of § 2244(d)(2).

Congress enacted AEDPA to further the principles of federalism, comity, and finality. *Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("There is no doubt Congress intended AEDPA to advance these doctrines"). Of course, the different provisions of AEDPA operate to promote the goals of federalism, comity, and finality in different ways. *See Walker*, 533 U.S. at 178-79; *see also Williams*, 529 U.S. at 436 (stating that "[f]ederal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts," and describing the relationship as a "delicate balance").

In particular, "[t]he 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. . . . This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Walker*, 533 U.S. at 179 (citations omitted). The exhaustion requirement, on the other hand, promotes comity and federalism because it requires prisoners to invoke "one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Thus, as this Court has recognized, the exhaustion requirement "ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Walker*, 533 U.S. at 178-79.

Unfortunately, the goals of finality, comity and federalism can sometimes work in opposition to each other, and AEDPA provides one such instance. The process of exhaustion takes time, and thus lengthens the period during which the prisoner's conviction is subject to collateral challenge. This extended period of uncertainty undercuts the state's interest in finality. The tolling provision of § 2244(d)(2), however, "balances the interests served by the exhaustion requirement and the limitation period." *Walker*, 533 U.S. at 179. It promotes exhaustion by protecting a prisoner's ability to pursue state remedies without losing the opportunity later to apply for federal habeas relief. *See id.* And it simultaneously safeguards the States' interest in the finality of their judgments by tolling the federal limitations period only while "properly filed applications for State post-conviction or other collateral review" are pending. *See id.* at 179-80; 28 U.S. § 2244(d)(2).

As explained below, Respondent's rule is far more faithful than Petitioner's to the careful balance struck in § 2244(d)(2) between the sometimes-competing principles of federalism, comity and finality.

1. Respondent's Presumption Promotes Federalism.

If Petitioner's rule is adopted, federal courts will routinely "second-guess" a state court's determination of state law, because they will be evaluating lack of diligence arguments that the California courts could have relied on *but chose not to*. If the California Supreme Court issued a "postcard" denial rather than a written opinion (or at least a denial with a citation to legal authority), it may well have considered the case an inappropriate vehicle through which to contribute to the body of state timeliness law. Alternatively, the California state court may have been of the opinion that it would be unfair to deny the petition on a procedural basis because the case was too close to call. Yet another alternative—one expressly recognized even by Petitioner—is that the postcard denial results from a *disagreement between the judges about the importance of enforcing California's procedural rules*. Pet. Br. 24.

Accordingly, under Petitioner's rule, federal courts will announce—and necessarily affect—California law regarding timeliness where the state courts, for any number of good reasons, felt it inappropriate to do so. This is a necessary and inevitable result of independent federal adjudication of timeliness in the face of state court silence on this issue. The *extent* of this intrusion may or may not result in federal courts significantly altering the content of California law. Regardless, the *existence* of this intrusion is anathema to federalism. Respondent's presumption leaves it up to California

to apply (and assures that it remains) California's law of timeliness, properly applied by the appropriate entities in our federal system.

Petitioner argues that it is Respondent's presumption that truly interferes with state judicial decision making because it would "force" the state courts to "state in every habeas case whether the petition was timely." Pet. Br. 38. This is not so. Respondent's presumption will only require the state courts to make an explicit determination of timeliness in those cases where the state court *wishes to foreclose statutory tolling under § 2244(d)(2)*. If the state court determines—in any given case—that it is more important to avoid making an explicit ruling on timeliness than it is to foreclose statutory tolling under AEDPA, it remains free to do so. As this Court has long recognized in a similar context, the state court can accomplish this end quickly and easily. *Cf. Harris v. Reed*, 489 U.S. 255, 265 n.10 (1989) ("[A] state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.'").

This is not the first time this Court has been forced to make such a choice. It addressed a nearly identical balance in *Harris v. Reed*. At issue in *Harris* was whether this Court should adopt a rule that required state courts to make an express procedural default determination if they wished to preclude federal habeas review on state law grounds. The alternative, just as it is here, was to allow federal courts to make an independent determination and application of state law to such petitions. This Court concluded in *Harris* that it would be far less destructive to federalism to require state courts to make an affirmative finding of procedural default under state law than a contrary rule that would require federal courts to conduct an

independent determination of such state law issues. This Court stated:

> Respondents claim that applying the *Long* "plain statement" requirement to habeas cases would harm the interests of finality, federalism, and comity. This Court has been alert in recognizing that federal habeas review touches upon these significant state interests. . . . We believe, however, that applying *Long* to habeas burdens those interests only minimally, if at all. The benefits, by contrast, are substantial. A state court remains free under the *Long* rule to rely upon a state procedural bar and thereby to foreclose federal habeas review to the extent permitted by *Sykes*. Requiring a state court to be explicit in its reliance on a procedural default does not interfere unduly with state judicial decisionmaking. As *Long* itself recognized, it would be more intrusive for a federal court to second-guess a state court's determination of state law.

Harris, 489 U.S. at 264. So too here. The Ninth Circuit's rule would require only that state courts make a finding of untimeliness in order to preclude tolling under AEDPA, and, as in *Harris*, such a requirement "does not interfere unduly with state judicial decisionmaking." *Id.* By contrast, Petitioner's rule would require federal courts to second-guess the deliberate decision of a state court not to reach the timeliness issue, and would necessarily involve the adjudication of this sensitive state law issue by a federal court. As in *Harris*, such a result "would be far more intrusive" on both state decisionmaking and on the interests of federalism than would the rule advanced by Respondent. *Id.* The core federalism concerns that underlie AEDPA accordingly militate strongly against the rule advanced by Petitioner and in favor of the rule advanced by Respondent.

2. Respondent's Presumption Promotes Comity.

Section 2244(d)(2) was designed to provide "a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts." *Walker*, 533 U.S. at 180. This Court has recognized that although other provisions, such as the exhaustion requirement of § 2254(b), provide individuals with good reason to exhaust state remedies, § 2244(d)(2) cannot be construed properly in a manner that is "out of step" with AEDPA's deliberate goal of promoting the exhaustion of remedies. *Id.*

Petitioner's rule is out of step with AEDPA's design because it encourages prisoners to make premature state and federal court habeas filings. Under Petitioner's rule, any prisoner who incurred any nontrivial delay in filing a habeas petition in the California Supreme Court faces two risks: (1) that the California Supreme Court might find the petition to be untimely, and (2) that the federal courts might find the petition to be untimely, thereby barring federal habeas review under AEDPA. Moreover, these risks would be additive; under Petitioner's rule, a habeas petitioner would incur the risk of (2)—a federal untimeliness finding—even if he successfully avoided a state court untimeliness finding under (1) because the state court, for whatever reason, elected not to declare the petition untimely (*e.g.*, to issue a "postcard" denial).

Those who exhaust their state remedies under Petitioner's rule will accordingly bear the burden of proving the timeliness of their state petitions under California law not once, but twice—once before the California courts, and then again before a federal court conducting independent review. Even if the hurdle were the same height both times, having to jump it twice would increase the risk that a state petition will be found untimely and hence that it will not toll the AEDPA limitations period.

Consequently, Petitioner's rule will result in two adverse effects, both of which have deleterious consequences. First, the risk that a delay in promptly concluding state court habeas remedies might result in an independent federal determination of untimeliness would increase the incentive for prisoners to file federal protective habeas petitions without awaiting final determinations on their state petitions to ensure that their federal petitions are not barred by § 2244(d)(1).[11] Such protective habeas filings will both burden the federal system and conflict with the purpose of AEDPA in ensuring that, in the interests of comity, state courts are permitted to resolve habeas petitions in their own tribunals prior to the intervention of the federal courts.

Second, the heightened risk of untimeliness findings that necessarily arises from the involvement of a second decision-maker will also result in a decision by prisoners to forego delay in the state habeas system even in those situations in which the state system would *prefer* such delay. California has, as noted above, deliberately created a flexible state habeas filing regime in which a petition before a California state court need only be filed within a "reasonable" period of time, rather than (as in almost all other States) within a set period. This procedural regime advances a variety of state interests. For example, it encourages more complete (and articulate) state habeas filings and ensures that state habeas petitions include all facts and evidence available to the petitioner, even if successfully obtained only after prolonged investigation. Under Petitioner's rule, however, a state habeas petitioner will be more likely to file

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11. If the Court accepts Petitioner's rule in this case, federal courts will also have to make independent determinations of timeliness in the face of silent denials *in all 50 states* in order to determine if the state court petition was "properly filed." *See Pace*, 125 S. Ct. at 1814. This will further increase the incentive for prisoners to file protective filings in federal court.

prematurely a petition before the California Court of Appeal or California Supreme Court for fear that any significant delay in filing such a petition may result in an independent federal determination of untimeliness *even if the California state court makes no such finding*. In this manner, Petitioner's proposed rule would conflict not only with the purposes of AEDPA, but would also frustrate California's interest in establishing and applying its own state law habeas regime.

Respondent's rule, by contrast, sacrifices none of these important principles and instead ensures that California remains responsible for ensuring and faithfully applying California's own state law timeliness rules. Such a result is preferable under AEDPA and advances the significant interests in comity that underlie the statute.

3. Respondent's Presumption Does Not Compromise Finality.

Petitioner suggests that Respondent's presumption will compromise the state's compelling interest in ensuring the finality of its criminal judgments. Pet. Br. 37 – 38. This argument should be rejected for three reasons.

First, Petitioner's argument is predicated on the mistaken notion that Respondent's presumption will delay the resolution of federal habeas cases. As explained in detail in Section II.B., *infra*, there is no reason to believe that Respondent's presumption will result in such delay. To the contrary, Respondent's presumption is more likely to streamline the resolution of federal habeas cases thereby conserving limited federal resources as well as advancing the state's interest in finality.

Second, Respondent's presumption provides the state of California with every opportunity to fully protect its interest in finality. California state courts can foreclose federal review by explicitly finding a state petition to be untimely. Alternatively, the California legislature (like 48 other states) can impose a set period of time by which a prisoner must file his state petition. Given these options, either of which may easily be invoked by the state, it is disingenuous to invoke the state's own interest in finality as an excuse for the federal court to engage in an independent analysis of state law—particularly when such an independent analysis will (i) substantially burden the federal courts (as described in Section II.B., *infra*) and (ii) violate principles of federalism and comity (as described in Section II.A.1. and 2., *supra*).

Finally, any concern that Respondent's presumption will allow prisoners to indefinitely toll AEDPA's statute of limitations is flatly unwarranted. As Petitioner notes, California does enforce its own timeliness standards. Pet. Br. 25 – 26. Thus, in cases of clear delay, the California state courts will give some indication that the petition at issue is untimely. *See In re Wells*, 434 P.2d 613, 615 (Cal. 1967) (finding petition to be untimely because of 19-year delay); *In re White*, 18 Cal. Rptr. 3d 444, 466 (Cal. Ct. App. 2004) (finding petition to be untimely because of 10-year delay); *In re Johnson*, 53 Cal. Rptr. 1 (Cal. Ct. App. 1966) (finding petition to be untimely because of 11-year delay).

4. Petitioner's Arguments Have Already Been Rejected By This Court in *Long* and *Harris*.

This Court has long recognized that requiring a state court to be explicit in its reliance on a procedural default best serves the interests of federalism, comity, and finality. In *Michigan v. Long*, this Court adopted a "'plain statement' rule," holding that

a federal court has jurisdiction to review a state court judgment unless the state court clearly expressed reliance on an adequate and independent state-law ground. *Michigan v. Long*, 463 U.S. 1032, 1042 and n.7 (1983). In *Harris v. Reed*, this Court extended that rule to the federal habeas context: "Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 263. Although the *Long* and *Harris* presumptions are not controlling in this case, the question at issue here presents the identical problem of how best to protect the significant state interests of federalism, comity, and finality while also enabling federal courts to review—and, where necessary, to vindicate—federal rights. The balance struck in the independent and adequate state-law grounds context is the correct one.

B. Respondent's Rule Is More Likely to Streamline the Resolution of Federal Habeas Cases.

Petitioner intimates that Respondent's presumption runs counter to the purpose of AEPDA because it will compromise the states' interest in finality by causing substantial delay in the resolution of federal habeas cases. Pet. Br. 35. Petitioner is mistaken. For the reasons explained below, Respondent's rule is unlikely to create more delay in the resolution of federal habeas cases than would Petitioner's rule.[12] Indeed, Respondent's

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12. In the words of one noted former California state court jurist, "In theory, consistent application of procedural bars imposes discipline on defense counsel and discourages abusive tactics. However, our efforts to curb lawyer excesses may come at too high a cost—at the expense of reasonably expeditious resolution of these cases." *In re Gallego*, 959 P.2d 290, 304 (Cal. 1998) (Brown, J., concurring and dissenting).

presumption is more likely to *expedite* the resolution of federal habeas cases and reduce the burden placed on the federal courts. Thus, it is Respondent's rule, not Petitioner's, that serves Congress' intent in enacting AEDPA.

1. The Two Rules Achieve Identical Results When a Petition Clearly Has No Merit.

In describing why, in most cases where a "postcard" denial was issued, California state courts do not reach the issue of whether the relevant state court petition was timely filed, Petitioner correctly notes:

> The state appellate court can therefore act both expeditiously and fairly by first considering the issue that can most easily be resolved from the information before it. Accordingly, many petitions can be, and are, denied because they do not present a prima facie case without the court ever even reaching the question of timeliness. . . . This practice of making a preliminary assessment of the petition is actually very similar to the preliminary review of a petition for writ of habeas corpus conducted by the federal courts under Rule 4 of the Rules Governing Section 2254 Cases. Under that rule, '[I]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition. . . .' As in California practice, the rule permits the court to 'screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer.' *The rule plainly permits the federal district court to summarily dismiss a petition for failure to make a prima facie case for relief.*

Pet. Br. 20-21 (citations omitted) (emphasis added). What Petitioner fails to recognize, however, is that—for this very reason—Respondent's presumption is, in practice, no different than the independent determination rule urged by Petitioner in cases where the federal habeas petition clearly has no merit. According to Petitioner, such cases comprise the vast majority of the thousands of habeas cases filed each year in California. Pet. Br. 23-24.

Under Respondent's rule, the federal court would be required to reach the merits of petitions when the state court is silent. If the federal petition in question, however, fails to state a prima facie case, the federal court has at its disposal Rule 4 of the Rules Governing Section 2254. Thus, like the state court before it, the federal court will summarily dismiss the petition.

Under Petitioner's rule, by contrast, the federal court can—instead of addressing the merits—conduct its own independent analysis of state law to determine whether the relevant state court petition was untimely. If the federal petition in question, however, fails to state a prima facie case, the federal court has at its disposal Rule 4 of the Rules Governing Section 2254. For this reason, it will not conduct its own independent analysis of state law. Rather, like the state court before it *and like the federal court acting under Respondent's rule*, the federal court will summarily dismiss the petition.

Thus, Petitioner's argument that Respondent's presumption is "manifestly contrary to Congress's intent in enacting AEDPA," Pet. Br. 37, because it will create delay in thousands of California cases each year is belied by the realities of actual habeas practice. In truth, the rules urged by Petitioner and Respondent will only

produce different results in those cases where a prisoner may have raised legitimate constitutional claims.[13]

2. Respondent's Rule Is More Likely to Streamline the Resolution of Petitions That May Raise Legitimate Constitutional Claims.

As explained above, the only cases in which the choice between the rules urged by Petitioner and Respondent will have any practical significance are those in which a prisoner's federal habeas petition *does* state a prima facie case. In such cases, however, Petitioner's rule does nothing more than unnecessarily complicate and delay the federal habeas process.

a. Even in those cases where Petitioner's rule is both dispositive and reliable, it is burdensome and dilatory.

As explained above, Petitioner's rule provides the federal courts with an additional basis on which a prisoner's federal habeas petition may be dismissed. Despite state court silence, the petition could be dismissed as time-barred under AEDPA if statutory interval tolling is needed in order for a prisoner's petition to remain within AEDPA's statute of limitations and the federal court independently determines that the prisoner's prior state court petition was untimely under state law. In such cases, the inquiry would stop (*i.e.*, the court would not need to

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13. For this reason alone, Petitioner's rule is particularly unwise. In the very cases that are most likely to present constitutional violations, Petitioner's rule risks foreclosing federal review to prisoners who properly complied with the state's procedural rules. *See* Section II.C., *infra*. Petitioner's rule does so without conveying *any* corresponding benefit in those cases in which prisoners have clearly *not* asserted a legitimate constitutional violation.

reach the merits). This might facially appear to create less burden and delay than Respondent's rule, which would require the federal court to reach the merits. Not so. For the following reasons, such a rejection on timeliness grounds—even if correctly decided by the federal court[14] is often likely to take more time and effort than the merits review that would be required under Respondent's rule.

i. California's timeliness rules are extraordinarily difficult to apply.

In California, a petition for collateral relief is timely filed as long as the prisoner either files without "substantial delay" or demonstrates "good cause" for the substantial delay. *See In re Harris*, 855 P.2d 391, 398 (Cal. 1993) ("[A] petitioner seeking relief on habeas corpus need only file a petition without substantial delay, or if delayed, adequately explain the delay."). Under California law, however, there is no general period of delay that triggers a presumption that it was "substantial." Nor is there a bright-line rule to determine whether there is "good cause" for the substantial delay. Indeed, under state law, delays of several months—or even years—are often deemed timely.[15] As a result, determining whether a prisoner has engaged

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14. Of course, if the federal court errs in its conclusion that the petition is untimely under state law, then it has wrongfully deprived the petitioner of federal review, in direct contravention of AEDPA, which permits statutory interval tolling when a state petition is timely filed.

15. *See In re Sanders*, 981 P.2d 1038, 1056 (Cal. 1999) (holding that petition was not time-barred, despite three-and-a-half year delay between the date on which the conviction became final and the filing of the first petition in state court, because attorney abandonment constitutes good cause for delay); *In re Stankewitz*, 708 P.2d 1260, 1262 and n.1 (Cal. 1985) (granting a habeas petition containing allegations of jury

(Cont'd)

in "substantial delay" and whether the "substantial delay" is excused by "good cause" necessarily requires a highly fact intensive and case specific inquiry.[16]

Under California state law, "[s]ubstantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *In re Sanders*, 981 P.2d 1038, 1042 – 1043 (Cal. 1999). A petitioner need not present a claim to the state courts if he

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(Cont'd)
misconduct despite a year-and-a-half-long delay in filing); *In re Huddleston*, 458 P.2d 507, 508 (Cal. 1969) ("The lapse of two and one-half years does not become unreasonable under the present circumstances."); *In re Moss*, 221 Cal. Rptr. 645, 649 (Cal. Ct. App. 1985) (finding a nine month delay to be "not significant" because petitioner could not obtain counsel); *In re Spears*, 204 Cal. Rptr. 333, 335 (Cal. Ct. App. 1984) (finding an eighteen month delay "not . . . significant" and also adequately explained by petitioner's circumstances); *In re Mitchell*, 437 P.2d 289, 292 (Cal. 1968) (finding petitioner's "ignorance of the law and legal procedures" sufficient to justify a delay of two years).

16. This is particularly true in capital cases where

> the claims . . . are seldom fewer than 10 and often more than 50, with many of the claims encompassing several subclaims and supported by facts that the petitioner or his counsel have discovered at various times. Determining the timeliness of each claim and subclaim in such a petition becomes extraordinarily complex, particularly in light of the tension between the timeliness requirement and the rule against piecemeal presentation of claims.

In re Robbins, 959 P.2d 311, 343 (Cal. 1998) (Kennard, J., concurring and dissenting).

knows only the "triggering facts—*i.e.*, facts sufficient to warrant investigation," but he must present the claim if he knows or reasonably should know of information "sufficient to state a prima facie case." *In re Gallego*, 959 P.2d at 296. Thus, in order to make the initial determination of whether substantial delay has occurred, a court must examine each claim asserted, the facts submitted in support of each claim, and the legal bases for each claim. The court must then decide when the prisoner learned, or reasonably should have learned, of these facts and legal bases. And the court must decide whether the information was sufficient to state a prima facie case (thereby triggering the duty to present the claim) or simply sufficient to trigger the prisoner's duty to investigate the claim. *See id.* Finally, the court must determine whether the delay between the discovery date and the filing date was in fact "substantial." Thus, even this initial determination of whether there has been substantial delay often involves a detailed and highly fact specific evidentiary inquiry. *See, e.g. In re Gallego*, 959 P.2d at 298 – 300.

In those cases in which the federal court finds there to have been a substantial delay, the court will then be required to determine whether there was "good cause" for the delay. *See Harris*, 855 P.2d at 398. Just as in determining whether a prisoner engaged in "substantial delay", this inquiry into "good cause" will often involve difficult factual determinations. Mr. Chavis' case is illustrative. He alleges that his delay was caused by, *inter alia*, the fact that he was (i) constructively denied access to the prison law library, and (ii) subjected to repeated lockdowns. Of course, there are other grounds for "good cause" under California law as well:

> Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an ongoing

> investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims.

In re Robbins, 959 P.2d 311, 318 (Cal. 1998).

Because of the fact intensive and case specific nature of the inquiry required to determine timeliness under California law, Petitioner's rule is unlikely to result in less delay than merely reaching the merits of these petitions.[17] As this Court is well aware, "it can take courts a significant amount of time to dispose of even those petitions that are not addressed on the merits; on the average, district courts took 268 days to dismiss petitions on procedural grounds."[18] As explained next, this is particularly true given the nature of "postcard" denials.

ii. "Postcard" denials present the most difficult questions of timeliness.

Petitioner spends a great deal of his opening brief explaining that under California practice, a "postcard" denial often issues

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17. While it is true that the adjudication of colorable constitutional claims is no easy task, the federal courts' special expertise is in interpreting federal statutes and the Constitution. *Cf. Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 827 (1986) ("The federal courts have acquired a considerable expertise in the interpretation and application of federal law.'") (Brennan, J., dissenting). Accordingly, as opposed to the fact-intensive adjudication of indeterminate state law timeliness issues that will result from Petitioner's rule, the adjudication of federal constitutional issues will be a far more familiar task.

18. *Walker*, 533 U.S. at 186 (Breyer, dissenting) (*citing* U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 23-24 (1995)).

without the court reaching the issue of timeliness. Pet. Br. 20-25. In particular, Petitioner explains:

> [T]here are several reasons why California appellate courts may in fact not decide the issue of timeliness at the stage before a summary denial issues. First there has not yet been an adversarial process in which issues are identified and argued. . . . Second, often it will simply be easier to first examine whether the petitioner has made a prima facie case. As noted before, California's timeliness standard is indeterminate and there are several exceptions to the bar of untimeliness that require a fact-intensive inquiry.

Id. 21.

Respondent does not disagree with this description of California appellate practice. These facts, however, provide even more support for the proposition that Petitioner's rule contravenes the purpose of AEDPA by unnecessarily complicating and delaying the adjudication of federal habeas cases.

As explained above, adjudication of timeliness under California state law is almost always a challenging and time intensive exercise. Under Petitioner's rule, the federal courts will regularly have to conduct such timeliness inquiries in "postcard" denial cases—cases in which, as Petitioner admits, the state court did not comment upon timeliness because either (i) this issue was too difficult or fact-intensive to address, or (ii) a majority of the state court judges or justices were not able

to reach consensus. If, as Petitioner correctly argues, California enforces timeliness standards, Pet. Br. 25-26, the fact that the California courts have chosen not to reach the issue of timeliness in "postcard" denial cases speaks volumes about the substantial burden and delay that will result from Petitioner's proposed requirement that federal courts conduct an independent determination in such cases. If the state court, applying state law, feels that a determination of timeliness would be overly burdensome or disruptive, it is at least equally—if not more—burdensome for a federal court to independently ascertain the proper resolution of this state law issue.

b. In cases where Petitioner's rule is not dispositive, it creates double work for the federal courts.

In yet other cases, the federal court (employing Petitioner's rule) may ultimately decide that the state court petition was *timely*. In these cases, the federal court will need to proceed to the merits of the prisoner's petition. As a result of Petitioner's rule, the federal court—in such cases—has engaged in double the work that would be required under Respondent's rule.

In sum, Petitioner's rule will likely create more work for—and delay in—the federal courts, not less. *Cf. Harris*, 489 U.S. at 264-65 (rejecting similar result in analogous context because such a "proposed rule would impose substantial burdens on the federal courts. . . . Much time would be lost in reviewing legal and factual issues that the state court, familiar with state law and the record before it, is better suited to address

expeditiously."). This was not Congress' intent in enacting AEDPA.[19]

C. Respondent's Presumption Preserves the Intended Function of the Great Writ.

Federal courts have a primary obligation to protect individual rights embodied in the U.S. Constitution. *Harris,* 489 U.S. at 267 (Stevens, J. Concurring). In considering petitions under 28 U.S.C. § 2254, federal courts "perform the core function of vindicating federally protected rights." *Id.* When faced with an alternative, AEDPA should not be applied in a manner which forecloses such review.

Under Petitioner's rule, it is inevitable that there will be cases in which a federal court will misconstrue California law in the wake of a California state court's silence on the issue of timeliness and erroneously foreclose federal review to prisoners who have complied with the statute's exhaustion requirements by filing their petitions within AEDPA's statute of limitations. If there must be some error, it should be error on the side of allowing federal review. If a federal court reviews a petition that the state court would have rejected as untimely had it been forced to address the issue, there will be some compromise to finality, but the imposition on the state will be minimal, because the federal court will either agree that the petition lacks merit,

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19. Moreover, Petitioner's rule will extend far beyond California. In light of this Court's recent decision in *Pace*, whether a petition is "properly filed" can turn on whether a late-filed state application was "excused" and, thus, timely under that state's law. If the Court accepts Petitioner's rule in this case, federal courts will also have to make difficult independent determinations of timeliness and excuse *in all 50 states* in order to determine if the state court petition was "properly filed."

in which case the propriety of the state's judgment is merely reinforced, or the federal court will vindicate rights that the state should have upheld. In contrast, if a federal court fails to review a petition Congress meant for it to review under AEDPA, the petitioner will have been stripped unfairly of federal protection.[20] As explained in Part II.B.1 and 2, *supra*, Petitioner's rule runs this risk *in those very cases* in which it is most likely that a constitutional violation has occurred.

III. The Ninth Circuit Decision Should Be Affirmed Because It Properly Applied Respondent's Presumption to the Facts of Mr. Chavis' Case.

If this Court agrees with Respondent that it is permissible for a federal court to presume from a state court's silence that the prisoner's habeas petition was "pending," then it is beyond dispute that the Ninth Circuit correctly tolled the three-year interval between the entry of judgment in the California Court of Appeal and the filing of Mr. Chavis' petition in the California Supreme Court.

The California Supreme Court issued a "postcard" denial of Mr. Chavis' habeas petition; the court did not comment or cite any cases in its order. It merely stated that, "[t]he petition for writ of habeas corpus is DENIED." J.A. 32. As such, its order communicated nothing about whether Mr. Chavis had timely filed his petition. The Ninth Circuit was therefore justified in presuming that Mr. Chavis' application was "pending" in the three-year period preceding filing.

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20. This federal protection is of critical importance—particularly in light of the inherent fallibility of our criminal justice system. *See, e.g.*, Death Penalty Ino. Ctr., Innocence: Freed from Death Row, at http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (noting that since 1973, 121 people on death row have been exonerated and released) (last accessed on 9/18/05).

CONCLUSION

The Ninth Circuit validly employed a presumption that Mr. Chavis' petition was pending because the California Supreme Court was entirely silent on the issue of timeliness. The Ninth Circuit's use of this presumption does not contravene this Court's holding in *Saffold* or the language of § 2244(d)(2). It is more consistent with principles of federalism, comity, and finality than Petitioner's proposed rule, and it avoids the burden on federal courts that Petitioner's proposed rule would impose. For these reasons, this Court should affirm the Ninth Circuit's use of such a presumption and its decision to toll the statute of limitations in this case.

If, however, this Court chooses to adopt Petitioner's rule, it should remand this case for further proceedings to determine if Mr. Chavis' petition would be considered timely under California law. *See Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003) ("The District Court is in a better position to reweigh all the facts in the record in the first instance in light of our explication of retrogression."); *Reno v. Bossier Parish School District*, 520 U.S. 471, 490 (1997) (remanding because district court may have accorded improper weight to evidence); *see also Johnson v. California*, 125 S. Ct. 1141, 1152 (2005) (deciding that the Ninth Circuit employed an incorrect legal standard and allowing the Court of Appeals or the district court to apply the correct legal standard in the first instance) (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 523, 557 – 558 (1994) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 – 1032 (1992)).

Respectfully submitted,

SHAUN P. MARTIN
Professor of Law
UNIVERSITY OF SAN
DIEGO SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110

RADHA A. PATHAK
Assistant Professor of Law
WHITTIER LAW SCHOOL
3333 Harbor Blvd.
Costa Mesa, CA 92626

PETER K. STRIS
Counsel of Record
JASON H. WILSON
PAUL J. LOH
ELIZABETH I. ROGERS
WILLENKEN WILSON LOH
& STRIS LLP
725 S. Figueroa St.; Ste. 1690
Los Angeles, CA 90017
(213) 955-9240

JOHN BRONSTEEN
Assistant Professor of Law
LOYOLA UNIVERSITY CHICAGO
25 E. Pearson St; Rm. 1320
Chicago, IL 60611

Counsel for Respondent